No. 14-1507

In the Supreme Court of the United States

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, DIRECTOR OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

North Dakota's brief demonstrates that there is not much that the Court must decide in this case. The State recognizes that, if the petitioner prevails in *Birchfield* and the Court holds there that the assertion of Fourth Amendment rights may not be criminalized, the State acted impermissibly in this case when it induced petitioner to consent to a search by threatening him with criminal prosecution for test refusal. And the parties agree that, in those circumstances, the Court should remand the case so that the state courts may, in the first instance, address remedial issues. See *Beylund* Opening Br. 13-15; N.D. Br. 8-13.

The only disputed question concerns the scope of the issues that would remain open on remand. North Dakota maintains that, notwithstanding the threat of prosecution issued to petitioner, his consent to be searched could have been voluntary, and that the state courts therefore should determine whether he actually consented to be searched for reasons *other* than the threat of prosecution. N.D. Br. 8-13. But for several reasons, it is beyond reasonable dispute that petitioner's consent was coerced and therefore *in*voluntary.

First, North Dakota asserts that the record regarding the circumstances under which petitioner agreed to be searched is "skimpy." N.D. Br. 12. What that actually means, as material reproduced by the State itself shows (*ibid.*), is that *both* courts below recited petitioner's consistent and undisputed explanation for why he consented to be tested: he was coerced by the State's criminal compelled-consent penalty. See Pet. App. 7a (petitioner "claims his consent to take the test was involuntary because he was coerced by the statute's penalties, which criminalize refusal" and

"does not allege any coercive circumstances, other than the penalties"); *id.* at 28a ("Petitioner's * * * final argument is that he was coerced into consenting to the chemical tests because refusal of the tests is a crime in North Dakota."). Aside from the entirely speculative (and highly improbable) alternative explanations conjured up by the State itself (see N.D. Br. 10), there is nothing to cast doubt on petitioner's statement.

Second, the State fails to recognize that *it* bore the burden of establishing voluntariness. "[W]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973) (quoting *Bumper* v. *North Carolina*, 391 U.S. 543, 548 (1968)); see also *Coolidge* v. *New Hampshire*, 403 U.S. 443, 455 (1971); *Beylund* Opening Br. 10. North Dakota now asserts that, if the Court rules for petitioner in *Birchfield*, the law of compelled-conditions will have changed, and the State should get the opportunity to remake its case. N.D. Br. 11 12. But the law governing voluntariness and coercion will not have changed. The State could have responded to petitioner's coercion argument, and sought to satisfy its burden, by showing that petitioner had his own motives to submit to a search. Cf. N.D. Br. 10. Having failed to do so, the State should not get another bite at the apple.

The flaw in the State's approach is shown by its assertion that petitioner "gave the hearing officer and state courts ample basis to conclude that his consent was voluntary" because he "present[ed] no facts regarding the impact the implied-consent advisory actually had on him"—other, that is, than his being told that his failure to consent was a criminal offense.

Levi Br. 13. But this, of course, turns the burden on its head. Petitioner was not obligated to volunteer evidence that he *really* meant it when he stated that he was coerced by the threat of criminal prosecution; it was the State's obligation to demonstrate voluntariness.

Perhaps the State would have a stronger argument if it were able to show that a driver, simply by the act of driving, *knowingly* consented to a search in an express quid pro quo with the State. But we showed in the *Birchfield* opening brief (at 21-29) that such a theory of either actual or "deemed" consent is unavailable to North Dakota here, and neither the State nor the United States has challenged that proposition.

Third, the State maintains that categorical rules are inappropriate in resolving questions of voluntariness. N.D. Br. 9-10.[1] As a general matter, we agree. But there is at least one unvarying rule regarding voluntariness: acts produced by threat of criminal prosecution are "the essence of coer[cion]." *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979). Such coercion not only is an improper method of producing consent in itself, but also infects the entire interaction. Threats of criminal prosecution produce citizen-officer encounters "instinct with coercion," and "[w]here there is coercion, there cannot be consent." *Bumper* v. *North Carolina*, 391 U.S. 543, 550 (1968).

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[1] Although the State also asserts that that whether consent is voluntary is a matter of fact, it seems most appropriate to approach voluntariness as a mixed question of law and fact. See Orin Kerr, *Voluntariness and the Law/Fact Distinction*, The Volokh Conspiracy (Dec. 5, 2013), perma.cc/U9TJ-MG2K ("Whether consent is voluntary is a conclusion based on a legal sense of what voluntariness means. It must have at least some legal elements in it.").

In these circumstances, if petitioner prevails in *Birchfield*, all that will remain to be done in this case on remand will be determination of the proper remedy for the involuntary search conducted by the State.

CONCLUSION

The judgment of the North Dakota Supreme Court should be reversed.

Respectfully submitted,

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* The representation of petitioner by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.